89-1442

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SAVE OUR STREAMS,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Federal Power Act permits exemption from license for a project utilizing a new dam;

Whether a court of appeals should decline review of agency jurisdiction due to petitioner's delay in agency intervention ("administrative estoppel").

PARTIES

Petitioner is California Save Our Streams Council, Inc., commonly known as Save Our Streams or SOS, a California non-profit corporation. Its members use the Rock Creek area within the Sierra National Forest for recreation and traditional Native American pursuits of food and craft material. It has no affiliations within the meaning of Rule 28.1.

Respondent is the Federal Energy Regulatory Commission, referred to herein as the Commission or FERC.

Exemptee is Mega Hydro, Inc., a California for-profit corporation. It did not intervene or seek party status in the Court of Appeals and, for that reason, is not named as a respondent. Three copies of this petition will be served by mail upon Mega Hydro, Inc. Affiliations of Mega Hydro known to petitioner are Resource Investments, Mega Renewables, and Castagna & Bean, for Rule 28.1 purposes.

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OPINIONS BELOW

The unpublished decision of the Court of Appeals is noted at 883 F.2d 1024 (9th Cir. 1989). The ruling on order denying intervention is at 38 FERC ¶ 61,058 (1987). The order denying rehearing is reported at 38 FERC ¶ 61,313 (1987). The opinion on the related rule-making petition, Order 503, was published at 53 Fed. Reg. 36567 (Sept. 21, 1988).

JURISDICTION

Respondent is statutorily authorized to exempt certain small hydroelectric projects from licensing. The crux of petitioner's position is that the Rock Creek Project[*1] is statutorily ineligble for exemption because it involves a new dam and impoundment of water. The Court of Appeals had jurisdiction to review a FERC decision on rehearing pursuant to 16 U.S.C. §825*l*.

The Court of Appeals entered its order denying rehearing on November 1, 1989. This court has jurisdiction under 28 U.S.C. §1254(1) to review the decision of the Court of Appeals. All petitions and motions herein were timely filed, except that petitioner's motion to intervene in the agency proceedings was filed after the period specified in the agency's ***Federal Register*** notice.

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*1 (This project is not the same project as another Rock Creek Project in El Dorado County, presently before this Court in California v. FERC, No. 88-333, although SOS is one of the amici curiae in that case.)

APPLICABLE STATUTES

16 U.S.C. §2708(b) authorizes FERC to exempt from license "...any project which utilizes or proposes to utilize natural water features for the generation of electricity, without the need for a dam or impoundment, in a manner which (as determined by the Commission) will acheive the purposes of this chapter and will do so without any adverse effect upon such natural water features."

16 U.S.C. §825*l*(a) provides in part that "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application for a rehearing thereon...."

16 U.S.C. §825*l*(b) provides in part that "No objection to the the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do...."

The Administrative Procedure Act, 5 U.S.C. § 706(2), declares that a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be in excess of statutory jurisdiction.

STATEMENT OF THE CASE

Rock Creek is not a mighty stream, but there are those who love it. The area to be impacted by the project includes areas known as the "Dips" and the "Chutes", popular for angling and recreation in the Sierra National Forest northeast of Fresno, California. The project area provides habitat for a plant species, ***Collomia Rawsonia***, Rawson's flaming trumpet flower, which is a candidate for listing as a Threatened and Endangered speicies

The reasons urged for certiorari are of national magnitude:

(1) Whether FERC is violating its enabling statute by exempting projects with new dams and impoundments such as the Rock Creek Project;

(2) If "administrative estoppel", as a matter of federal administrative law, authorizes a reviewing court to decline to consider a challenge to agency jurisdiction, in contravention of several decisions of this court and the Administrative Procedure Act.

The Court has the opportunity to pour oil on troubled waters of legal uncertainty by restating what it said in 1952, that issues of agency statutory jurisdiction are a "bright-line" exception to normal administrative exhaustion. We further urge the Court to disapprove the doctrine of "administrative estoppel" beyond exhaustion precedents of this Court and to resolve a conflict between the First and Fifth Circuits on this doctrine.

THE FIGHT OVER EXEMPTIONS FOR NEW DAMS

The present case is the latest round, and the first in this Court, in an eight-year dispute over whether FERC can exempt from license hydroelectric projects utilizing new dams and impoundments of water. In 1980, Congress enacted a then-obscure amendment to the Federal Power Act authorizing exemptions for "natural water features".*2

In 1981, FERC enacted regulations that low dams qualified as "natural water features" with no restriction on the length of stream to be dewatered by the projects. The era known as "hydromania" or the "new gold rush" ensued.*3

One consequence of this era was an explosive increase of 4000 percent in the number of applications presented annually to FERC for license, permit and exemption.*4

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*2 The amendment was without controversy of record and our research has failed to disclose any legislative history whatever to shed any light on the amendment's legislative intent.

*3 See Herron, "The Rush Is On to find New Gold in Falling Water", Dec. 1982, ***Smithsonian***, p. 87

*4 Thomas, et al., "Federal Incentives for Hydroelectric Power Projects at New Dams: FERC's Failure to Recognize Congressional Intent and Environmental Concerns", 18 U.C. Davis L.Rev. 287, 304 (1984)

Environmentalists and Indian tribes petitioned FERC for rehearing of these rules. FERC denied rehearing, but the Ninth Circuit ultimately invalidated case-specific regulations authorizing exemtions for new dams in the ***Tulalip Tribes*** decision in 1984.*5 That decision contains a comprehensive legislative and administrative history of low dam exemptions.*6

*5 ***Tulalip Tribes*** v. ***FERC***, 732 F.2d 1451 (9th Cir. 1984). The decision was one of three that year which should have, but has not, reformed some of FERC's more blatant statutory abuses, Blumm, "A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing," 10 Harv. Envt.L.Rev. 1 (1986).

*6 Another judicial review of this era's legislative history is in ***Swanson Mining Corp.*** v. ***FERC***, 790 F.2d 96, 98-99 (D.C.Cir. 1986)

FERC's response to ***Tulalip Tribes*** may fairly be described as an "avalanche" contrasting with its normally glacial pace of consideration. In four decisions, it grandfathered exemptions for projects already operating[*7], projects which had colorably commenced construction by the date of the judicial decision[*8] and allowed exemptees with vacated exemptions special access to license or amended exemption.[*9]

In a critical group of projects, FERC confirmed previously-issued exemptions because FERC felt, without any articulated criteria, that those projects utilized a "natural water feature" despite the ***Tulalip Tribes*** decision.[*10] (Order 503 would later clarify the Commission's willful misinterpretation of ***Tulalip Tribes*** — that a dam which did not raise the pre-existing water level at the dam is not a dam for exemptions.)

[*7] Forward, 28 FERC ¶61,063 (1984)

[*8] Eagle Power, 28 FERC ¶61,061 (1984)

[*9] Snowbird, Ltd., 28 FERC ¶61, 062 (1984)

[*10] Pigeon Cove, 28 FERC ¶61,064 (1984)

In 1985, SOS acquired paralegal services, and petitioned FERC to adopt rules for "natural water features" complying with ***Tulalip Tribes***. The national groups party to ***Tulalip Tribes*** also petitioned FERC to reconsider the Eagle Power cluster. The latter petition was denied[*11], while SOS' rule-making petition languished in FERC's files for three years without any action of record whatsoever.

In, the meantime, FERC republished its natural water feature regulations in the same verbatim form that had been declared invalid in ***Tulalip Tribes*** with the cryptic footnote that by republishing the regulations it did not claim they were valid, a disclaimer not carried over into the C.F.R. edition of the regulations or into FERC's actual practice in granting "low dam" exemptions such as the Rock Creek Project. SOS acquired counsel and filed an action in the nature of mandamus in the Court of Appeals to require FERC to act on SOS' rule- making petition.[*12]

[*11] Pigeon Cove, 30 FERC ¶61,250 (1985). That decision also denied Mega's petition for rehearing of the decision to vacate its exemption for the Rock Creek Project.

[*12] See ***Functional Music*** v. ***FCC***, 274 F.2d 593 (D.C.Cir. 1958)

After the Court of Appeals ordered FERC to file an answer in that action, FERC finally repealed the regulations declared invalid by ***Tulalip Tribes*** in Order 503. The Commission again restated what the Court of Appeals had disapproved in ***Tulalip Tribes*** — that Congress "must have intended" to allow exemption of projects involving new dams — and that "adverse effects" to the stream's bypassed reaches were not "adverse" if no fish and wildlife agency objected. The crux of FERC's jurisdictional error is its persistence that it may define differently the plain English word "dam" for licensing and exemptions. The Commission has a perfectly comprehensible definition of "dam" — "any structure for impounding or diverting water", FERC Rele 4.30(b)(4)(i) — but continues to grant exemptions for low dam "diversion structures", ***e.g.*** 48 FERC ¶62,191 (Sept. 15, 1989), regardless of the length of dewatered reach (there one and one-half miles, one mile in the present case).

HISTORY OF THE ROCK CREEK EXEMPTION

There were four competing applications filed for a Rock Creek Project early in the "New Gold Rush." Resource Investments filed for exemption on December 14, 1981; this was granted March 16, 1982, 28 FERC ¶62,275. FERC voided the exemption after ***Tulalip Tribes*** and Mega Hydro, a successor to the original exemptee, filed an amended application for exemption on November 15, 1984 for a "lower dam" project.

SOS learned of the new application in June, 1985. Both the Commission and the Court of Appeals considered it dispositive that SOS did not immediately move to intervene, reflecting a misunderstanding of Commission procedures prior to Halecrest Co., 38 FERC ¶61,312 (1987), decided the same day as the present case, and then relied upon to deny SOS intervention. The earlier practice was not to accept interventions prior to the intervention period set out in the notice of application published in the ***Federal Register***, as noted in the petition for rehearing (App.).

The chairman of the Commission had also assured Congress that no new exemptions would be issued until the Commission adopted new regulations complying with ***Tulalip Tribes***, a pledge we respectfully submit that the public was entitled to rely upon. ***Small Hydro Programs***, Hearing Before the Subcommittee on Energy Conservation and Power, September 11, 1984, p. 304.

Approximately one year later, SOS learned that the ***Federal Register*** notice had already been published for an amended "lower dam" Rock Creek Project and promptly filed a motion for late intervention complying with FERC Rule 214. The motion clearly stated SOS' jurisdictional objection to exemption for a new dam project (App.). Staff denied the motion. The Commission upheld this on appeal, contending that SOS should have anticipated the Halecrest Co. decision on the same day, that "within" included

"before" the notice period, 38 FERC ¶61,058 (1987).[*13] SOS' timely petition for rehearing, including its objections as to jurisdiction, was denied with no discussion of the jurisdictional issue, 38 FERC ¶61,313 (1987)(App.). The exemption was issued March 16, 1987, 38 FERC ¶62,275.

ARGUMENT

I.

AN ADMINISTRATIVE AGENCY MUST NOT BE ALLOWED TO EXPAND ITS AUTHORITY BEYOND A STATUTE AS CONSTRUED BY ITS REVIEWING JUDICIARY.

"It is the quintessential function of the reviewing court to interpret legislative delegation of power and to strike down those that traverse the limits of statutory authority." ***Office of Communication of United Church of Christ*** v. ***FCC***, 797 F.2d 1414, 1423 (D.C.Cir. 1983)

[*13] ***See City of Gallup*** v. ***FERC***, 702 F.2d 1116, 1123- 24 (D.C.Cir. 1983) for a discussion of prematurity in filing FERC petitions for rehearing. Prior to Halecrest Co., interventions were only permitted "within" the ***Federal Register*** notice period, since many applications were amended prior to that notice. Halecrest Co. cited no precedent that "within" included "before" for rule 214 purposes.

If there is one unifying theory of judicial review of administrative action, it is strict scrutiny of statutory compliance. "The first duty of a reviewing court is to '...determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory charter, abused or exceeded its authority. '" ***In re Permian Basin Area Rate Cases***, 390 U.S. 747, 791 (1968). See also ***Mobil Oil Co.*** v. ***FPC***, 417 U.S. 283, 307-08 (1974).

"Usually much deference is given to the decisions of an administrative agency, acting within the scope of its authority. However, when the question is one of law and does not involve the expertise of an agency, we are not bound by that agency's decision. This is particularly true when the decision of the agency is based upon an interpretation of a judicial decision or a statute." ***Charter Limousine, Inc.*** v. ***Dade County Board of County Commissioners***, 678 F.2d 585, 588 (5th Cir. 1982)

"When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.' ***ICC*** v. ***Clyde SS Co.***, 181 U.S. 29 (1901)" ***NLRB*** v. ***Enterprise Assn. etc.***, 429 U.S. 507, 522 fn. 9 (1977).

"An agency may not finally decide the limits of its own power. That is a judicial function. Social

Security Board v. Nierotko, 327 U.S. 358 (1946)', NLRB v. Brown, 380 U.S. 278, 291-92....
"We bear in mind 'the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by violating its statutory mandate.' FMC v. Seatrain Lines, Inc., 411 U.S. 726", ***Office of Consumers Council*** v. ***FERC***, 656 F.2d 1132 (D.C.Cir. 1980)

This is precisely the situation in the instant case: the agency adopted regulations authorizing exemptions for new dams beyond its statutory authority. Those regulations were declared invalid by the ***Tulalip Tribes*** decision. The agency chairman promised Congress that the agency would issue no new exemptions until new regulations were adopted. The agency persisted in interpreting the statute in a manner that the ***Tulalip Tribes*** court had said was plainly unlawful. Calling the dam proposed for Rock Creek a "diversion structure" rather than a "dam" and ignoring the impoundment in excess of 100,000 gallons to be created by the one-mile penstock is not administrative expertise — it is plainly unlawful sophistry. This is a dam under the agency's own definition, except that the agency says that a dam is not a dam for purposes of exemptions.

In ascertaining congressional intent, it must be presumed that Congress, in prohibiting exemptions for new dams, was cognizant of the decision in ***Lake Ontario Land Development and Beach Protection Assn.*** v. ***FPC***, 212 F.2d 227, 232 (D. C. Cir. 1954); ***cert.den.***, 347 U.S. 1015 (1954) that a "dam" under the Federal Power Act is not limited to a structure completely obstructing the stream, as the Commission has construed ***Tulalip Tribes*** and the Energy Security Act as to exemptions.

II.

PETITIONER'S EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS BOTH REASONABLE AND ADEQUATE.

There is an exception to the general principle of administrative exhaustion where the agency lacks statutory jurisdiction, ***United States*** v. ***L.A. Tucker Truck Lines***, 344 U.S. 33, 37 (1952) (hereinafter ***Tucker Truck***); ***Manual Enterprises*** v. ***Day***, 370 U.S. 478, 490 (1962); ***Utah Power & Light Co.*** v. ***FPC***, 339 F.2d 436, 438 (10th Cir. 1964); K. Davis, ***Administrative Law Text*** 387-91 (1972); ***Kotherman*** v. ***FTC***, 339 F.2d 587 (5th Cir. 1969) (exhaustion unnecessary if the administrative order is a "nullity")

Parker v. ***United States***, 448 F.2d 793, 798 (10th Cir. 1971) sets forth five factors for judicial evaluation of exhaustion: (1) Is there a statute requiring exhaustion? (2) Is the issue presented one of "pure law" not requiring administrative expertise? (3) Is there a possibility of saving judicial time by requiring exhaustion? (4) Has the administrative decision been considered through all levels of the agency? and (5) The doctrine of exhaustion is to promote orderly procedure in the administrative process and not for the benefit of third parties. We concede that the Federal Power Act requires exhaustion by filing a petition for rehearing and awaiting its disposition prior to judicial review. ***FPC*** v. ***Metropolitan Edison Co.***, 304 U.S. 375, 383-87 (1938). We concede further that the Federal Power Act generally bars judi-

cial consideration of a point which was not raised in a petition for rehearing, ***Towns of Norwood et al.*** v. ***FPC***, 546 F.2d 1036 (D.C.Cir. 1976).

The instant case is not one where a petition for rehearing was omitted, ***FPC*** v. ***Colorado Interstate Gas Co.*** 348 U.S. 492 (1955). The petition for rehearing clearly set forth the point that the Commission lacked statutory power to exempt the Rock Creek Project from licensing (App.). The Federal Power Act is a "toggle switch". The reviewing court will consider points made as late as the petition for rehearing based on the record, ***Villages of Chatham, et al.*** v. ***FERC***, 682 F.2d 23, 30 (D.C.Cir. 1981). Conversely, the reviewing court will not usually consider questions not raised in the petition for rehearing, ***Kentucky Utilities Co.*** v. ***FERC***, 766 F.2d 239, fn.1 at 241 (6th Cir. 1985).

The instant case is not even a close point as was ***City of Vernon*** v. ***FERC***, 845 F.2d 1042, 1047 (D.C.Cir. 1988), notable for its colorful prose. The majority noted that "The Commission cannot be asked to make silk purse responses to sow's ear arguments. " In dissent, Judge Williams noted that "Vernon pretended that it sought relief from plain vanilla discrimination, while in fact its underlying theory

was hot fudge strawberrry banana swirl with sprinkles. " (845 F.2d at 1051).

The instant case is one of "plain vanilla" statutory excess, timely presented in "silk purse" form to the Commission in the petition for rehearing.[*14] Indeed, Order 503 makes clear that FERC would have exempted the Rock Creek Project from licensing despite SOS' objection, even if SOS' case-specific intervention had been timely under the agency rules.

Thus, all five factors of ***Parker, supra***, are satisfied here. Since the Court of Appeals did not elucidate its rationale by citation to statute or precedent, we must assume that the summary affirmance was "punishment" of SOS for its failure to earlier intervene before the agency in 1985.

[*14] The petition raised the statutory issue four times in four different ways. R. 574, item 6, item 9, R. 575-6, and R. 578-9. (Appendix)

III.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT A PERNICIOUS DOCTRINE OF "ADMINISTRATIVE ESTOPPEL".

"Many environmentalists believe that executive boards often become captives of the special interests they are supposed to watch over, and thus cannot be relied upon to protect the interests of the general public. " Note, "Administrative Preclusion of Environmental Citizens' Suits", 1987 U.Ill.L.Rev. 163, 173 (1987). We do not contend that even complete judicial relief in this case will reverse that trend. What SOS seeks is a judicial level playing field with the agency, a procedure not accorded below.

It has become popular with many administrative agencies to seek to evade judicial review by unwarranted extensions of the exhaustion rule. See ***Dobbs*** v. ***Train***, 409 F.Supp. 430 (W.D.Ga. 1975), affirmed ***sub nom. Dobbs*** v. ***Costle***, 559 F.2d 946 (5th Cir. 1977). The Fifth Circuit has rejected the doctrine of "administrative estoppel", that because the challenger did not participate in the administrative rule-making it could not judicially challenge the rule, ***City of Seabrook*** v. ***EPA***, 659 F.2d 1349 (5th Cir. 1981)" The rule urged by EPA would require everyone who

wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated. This is a fate this court will impose on no one."

That "fate" is precisely what this agency wants and what the Court of Appeals dealt out below. In Order 503, the Commission expressly stated as a ground of denying SOS' challenge to exemptions for low dams that SOS "should have" petitioned for intervention in the post-***Tulalip Tribes*** dockets in 1984. In denying late intervention, the Commission implied that SOS "should have" anticipated the ruling in Halecrest Co. that "within" would include "before" as the time for filing interventions under rule 214. The Commission's sole justification for its action before the Court of Appeals was SOS' lateness. That is the sole reason advanced by the panel below for its summary affirmance.

The only circuit to expressly adopt "administrative estoppel" and, to decline to consider a question of statutory agency jurisdiction prior to the decision below is the First Circuit. In ***Presque Isle Television Co.*** v. ***United States,*** 587 F.2d 502, 505 (1st Cir. 1967), that court refused to consider a statutory juris-

dictional question which had not previously been presented to the agency. "There may, of course, come a time where an agency's 'patently' exceeding the orbit of its jurisdiction offends a public interest quite apart from the interests of the parties."

We respectfully submit that when an agency violates its enabling statute that the public interest is injured in every case, ***NLRB*** v. ***Ochoa Fertilizer Co.***, 368 U.S. 318, 347 (1961). ***Presque Isle*** gives lip service to ***Tucker Truck*** but violates its plain meaning. Exhaustion is not a doctrine to be blindly applied, particularly as to questions of statutory construction, ***McKart*** v. ***United States,*** 395 U.S. 185, 197-8 (1969); ***H.W. Wilson Co.*** v. ***U.S. Postal Service***, 589 F.2d 33, 37 (2d Cir. 1978); ***Bituminous Coal Operators Assn., Inc.*** v. ***Secretary of Interior***, 547 F.2d 240 (4th Cir. 1977).

Nor was ***Presque Isle*** a one-time aberration of the First Circuit, see ***Massachusetts*** v. ***Hayes,*** 641 F.2d 57, 60 (1st Cir. 1982): "We would hesitate therefore, to declare [the regulation] invalid even if it were clearly beyond the agency's statutory authority. " (remarkably citing ***Tucker Truck*** for this proposition). At least one judge of the Tenth Circuit would impose ***Federal Register*** servitude on the nation by draconian "administrative estoppel." See ***Big Horn Coal Co.*** v. ***Temple***, 793 F.2d 1165, 1169 (10th Cir. 1986) (Barrett, J., concurring).

"Administrative estoppel" to prevent jurisdictional review has been correctly rejected by the Fifth Circuit, ***supra***, and this court should grant certiorari to clarify that ***Tucker Truck*** is still good law and that "administrative estoppel" is not applicable to questions of statutory jurisdiction of the agency.

It is particularly inappropriate to apply this pernicious doctrine in favor of an agency which has persistently violated its enabling statute, after clear judicial correction. "We do not imply that, once the Commission makes a statutory interpretation, it is bound by a sort of agency stare decisis. Error is not to be perpetuated simply because it has once been made, and wisdom is not to be rejected merely because it comes late. " ***Western Coal Traffic League*** v, ***United States,*** 694 F.2d 378, 391 (5th Cir. 1982)

Allowing late intervention and judicial review will not give environmentalists "the key to the agency." Hydro promoters already have "the key to the agency." FERC regularly permits late intervention, particularly when the intervenors' views coincide with those of the finder of fact. See cases compiled by Herman, I ***FERC Practice and Procedure Manual*** ¶214, pp.36-37 (looseleaf); ***e.g., Swanson Mining Corp.*** v. ***FERC***, 790 F.2d 96, 105 (D.C.Cir. 1986). The agency is well-equipped to assure orderly proceedings in late interventions, FERC Rule 214(d)(3). Applying the draconian penalty of denial of intervention to prevent judicial review as to agency jurisdiction should never be allowed.

CONCLUSION

We respectfully urge the court to grant a writ of certiorari and rule that FERC is without statutory power to exempt projects with new dams from licensing, and that a party's non-statutory administrative delay does not preclude review of an agency's statutory jurisdiction.

Bearing in mind this Court's caseload, that there is no circuit conflict on the Federal Power Act exemption issue, and that only the First Circuit has clearly exceeded ***Tucker Truck*** in circuit precedents, petitioner respectfully submits that upon certiorari, summary disposition, vacating the decision below, citing ***Tucker Truck*** and a Fifth Circuit precedent rejecting "administrative estoppel", and remand would suffice to remind the courts of appeal that ***Tucker Truck*** remains good law, and to alert counsel for the agencies that there is no "agency repose" for action in excess of statutory authorization.*15

Respectfully submitted,

Glenn M. Kottcamp
Attorney for Petitioner

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*15 The court's meaning would be even clearer if it disapproved the two First Circuit opinions.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED AUG 22 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

SAVE OUR STREAMS, Petitioner,	No. 87-7194
v.	FERC Nos. 5756-005, 5756-006
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	MEMORANDUM *

Appeal from on Order of the

Federal Energy Regulatory Commission

Submitted August 18. 1989 **

San Francisco, California

Before: WIGGINS, KOZINSKI AND RYMER, Circuit Judges.

The orders of the Federal Energy Regulatory Commission denying petitioner's motion for late intervention are affirmed. See

Nos. 5756-005 July 30, 1986) (Notice Denying Late Intervention); 5756-006 (Jan. 28, 1987) (Order Denying Appeal); 5756-009 (Mar. 27, 1987) (Order Denying Rehearing). Petitioner concedes it had actual notice of the application in mid-1985, shortly after the June 27, 1985, intervention deadline, and nearly a year before it filed its motion to intervene. Because petitioner has failed to show good cause for the delay, the Commission did not abuse its discretion in denying the motion. See 18 C.F.R. Sec. 385.214(d) (1988)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34.4.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED NOV 1 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

SAVE OUR STREAMS, Petitioner,	*	No. 87-7194
v.	*	FERC Nos. 5756-005, 5756-006
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	*	ORDER

Before: WIGGINS, KOZINSKI and RYMER,

Circuit Judges

The petition for rehearing is denied. The full court was advised of the suggestion for rehearing en banc and no active judge having called for a vote, the suggestion is rejected.

Nos. 5756-005 July 30, 1986) (Notice Denying Late Intervention); 5756-006, (Jan. 28, 1987) (Order Denying Appeal); 5756-009 (Mar. 27, 1987) (Order Denying Rehearing). Petitioner concedes it had actual notice of the application in mid-1985, shortly after the June 27, 1985, intervention deadline, and nearly a year before it filed its motion to intervene. Because petitioner has failed to show good cause for the delay, the Commission did not abuse its discretion in denying the motion. See 18 C.F.R. Sec. 385.214(d) (1988)

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** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34.4.

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha G. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve

Mega Hydro, Inc.) Project No. 5756-006

ORDER DENYING REHEARING

(Issued March 27, 1987)

By order issued January 28, 1987, 1/ the Commission denied the appeal filed by the California Save Our Streams Council (SOS) to intervene in the proceedings associated with

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1/ 38 FERC Para. 61,058 (1987). The Secretary's notice was unreported.

the application for exemption filed by Mega Hydro, Inc. (Mega) for the Rock Creek Project No. 5756. Our denial of SOS's appeal was based on our conclusion that SOS had failed to show good cause for filing its motion to intervene more than one year after the Federal Register notice of the application was issued 2/ and nearly one year after the deadline for submitting motions to intervene established in the published local newspaper notice. 3/

SOS has filed a timely request for rehearing of our January 28, 1987 order, arguing that the National Environmental Policy Act of 1969 (NEPA) established a public notice standard independent of the Federal Power Act (FPA) and that we failed to meet this NEPA standard. SOS contends that the Commission's

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2/ SOS' motion to intervene was filed on June 17, 1986. The Federal Register notice was issued on May 28, 1985.

3/ The newspaper notice, which was published in the Madera Tribune, set June 27, 1985, as the deadline for submitting comments, competing applications, and motions to intervene.

notice policy improperly curtails the public involvement contemplated under NEPA for considering environmental impacts.

While we agree that NEPA generally requires that the Commission solicit public comment on relevant environmental matters, we believe our obligations in this regard were met in this case with the publication of the Federal Register and newspaper notices in this proceeding. These notices informed the general public of the pendency of the application and the opportunity to bring environmental matters to our attention.

SOS also states that it did not seek intervention when it first learned of the project, because a motion to intervene filed prior to the Federal Register notice would have been rejected as premature. This is incorrect. As we explain in another order issued today, 4/ the Commission's regulations do not limit the filing of intervention motions to a time after notice is issued. Persons are free to seek

intervention prior to such notice.

Finally, SOS contends that its interests are not adequately represented by federal and state resources agencies and that late intervention will not cause undue prejudice to Mega or disrupt the timely processing of the application. However, SOS has not shown that it has any specific interests that are not adequately represented by federal and state resource agencies.

The Commission orders:

The request for rehearing filed on February 27, 1987, by the California Save Our Streams Council in the above-captioned proceeding is denied.

By the Commission.

(S E A L)

s/

Lois D. Cashell,

Acting Secretary

4/ The Halecrest Company, Project No. 9401, 38 FERC Para. 61,___ (1987)

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

In the matter of the Application for Exemption from Licensing by Mega Hydro, Inc for Project Proposed on Rock Creek in eastern Madera County California	Project No. 5756-006

PETITION FOR RECONSIDERATION

OF ORDER DENYING APPEAL

California Save Our Streams Council
P.O. Box 56
North Fork, CA 93643
(209) 877-4644

Proposed Intervenor and Protestant

INTRODUCTION

This is a petition to reconsider the Commission's Order Denying Appeal dated January 28, 1967 (hereinafter cited as Order). The petition for late intervention and appeal are hereby inforporated by this reference. All pleadings and memoranda in the United States Court of Appeals, Ninth Circuit, No. 86-7592 are incorporated by this reference. References to NEPA are to the National Environmental Policy Act of 1969. References to CEQ are to the Council on Environmental Quality established by NEPA. References to the EIA are to the Upper San Joaquin Environmental Impact Assessment by this Commission. EIS is an Environmental Impact Statement. EA is staff's environmental assessment of the Rock Creek project.

I.

THE COMMISSION'S NOTICE PROCEDURES WERE NOT ADEQUATE TO PROVIDE ACTUAL NOTICE TO POTENTIAL PROJECT OPPONENTS.

The Order cites publication in the Federal Register and the newspaper of the county seat as sufficient to cut off intervention after 30 days. The Order plays semantic games that the Madera Tribune has a larger circulation in the "area" that the mountain papers. Depending on the definition of the "area", the New York Times has a larger circulation in the "area" of the United States than the mountain papers; the Los Angeles Times has a greater circulation in the "area" of California than the mountain papers. Eastern Madera County has approximately 22,000 residents. The Madera Tribune has a circulation of approximately 450 in eastern Madera County, while the Sierra Advertiser has a circulation of 8,000 in that "area". (Statement of Supervisor Harry Baker, Madera

County Board of Supervisors, February 17, 1987.)

The formalistic substitute notice was unlikely to be actually noticed by the residents of North Fork or eastern Madera County in general. Even though Commission staff was aware of SOS' opposition to the Rock Creek Project (as well as the other projects in the EIA), not even a simple first-class letter was mailed to us, advising issuance of Federal Register publication or cut-off dates. We contend that whatever skimpiness of notice which may be permissible under the Federal Power Act, that NEPA and the CEQ Guidelines do not allow a ritualistic formalism such as Federal Register publication to replace more meaningful means of providing actual notice..

II.

NOTICE OF PENDENCY OF APPLICATION IS NOT NOTICE OF CUTOFF OF PROTESTS.

The Order stresses that SOS had notice of the pendency of the application in 1985 and did

that NEPA contained an implied due process standard of notice to the public and an opportunity to submit relevant facts which might bear upon the agency's threshold decision whether to prepare and EIS. E.g., Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert.den., 412 U.S. 908.

On May 24, 1977, President Carter issued Executive Order 11991, requiring all federal agencies to adopt regulations consistent with Guidelines to be issued by the CEQ. The CEQ Guidelines were published and became effective on July 29, 1979. The Guidelines were declared by the Supreme Court to be binding on all federal agencies. Sierra Club v. Andrus, 442 U.S. 347 (1979) (While the Guidelines thus became mandatory, they are commonly referred to as Guidelines, from the prior time when they were advisory.) At least one court held this Commission's predecessor could not independently constre the NEPA statutory term "action", but was bound by the CEQ definition,

not seek intervention until ten months later. However, the Order fails to recognize that the Commission's procedures open a brief "window of time" for protests. Premature protests are not accepted. This application, now in its 6th incarnation (-006), has been on file for years. A protest filed prior to the Federal Register notice would have been premature. Notice of the pendency of an application is not an adequate basis for denying intervention, where as here, protestantmoved promptly upon receiving actual notice by telephone that the project had been noticed for intervention and protest.

III.

NEPA ESTABLISHES A PUBLIC NOTICE STANDARD INDEPENDENT OF THE FEDERAL POWER ACT. THIS COMMISSION'S REFUSAL TO ENACT CEQ-CONSISTENT REGULATIONS VIOLATES BOTH NEPA AND EXECUTIVE ORDER 11991.

Even prior to Executive Order 11991 and the mandatory CEQ guidelines, the courts held

even prior to the referenced Executive Order. Transcontinental Gas Pipe Line Corp. v. Hackensack Meadows Development Commission, 484 F.2d 1358 (2d Cir. 1972).

One of the elements of the CEQ guidelines is public involvement. 40 C.F.R. Secs. 1506.6, 1501.4(c)(1). The instant Order curtails public involvement by, in effect secretly opening a tiny "window of time" and thereafter permanently closing it. If the public comes too early, the window is closed. (Reference the dozens of "Your comment is noted." so-called responses by staff to comments in the EIA) If the public misses this brief window, it is denied participation. We respectfully urge that NEPA and the CEQ Guidelines add to this Commission's notice responsibilities, above and beyond those of the Federal Power Act, and the Order, sanctioning virtually secret notice and thereafter cutting off intervention, shirks those responisbilities. For lack of meaningful notice alone, the Order

should be reversed.

IV.

SOS ADEQUATELY DEMONSTRATED THAT IT HAD GOOD CAUSE FOR LATE INTERVENTION.

The Order states in a conclusory manner that SOS has not demonstrated that its interests would not be adequately represented by the fish and wildlife agencies. Assuming for the purpose of argument that those agencies will adequately represent SOS' position as to fish and wildlife, there were nine other issues presented by SOS' moving papers beside fish and wildlife concerns:

(1) aesthetics of the project area and the potential for project impacts thereon;

(2) recreational values of the project area and the potential for project impacts thereon;

(3) Native American values in the project area and the potential for project impacts thereon;

(4) Lack of need for project power;

(5) Socioeconomic impacts of the project, including adverse impacts to ratepayers,

(6) Illegality of exemption from licensing a project involving a dam, an impoundment of water and indirect precedential impacts of approving such an exemption for the Rock Creek Project;

(7) Coordination of environmental assessment with the California State Water Resources Control Board as required by CEQ Guidelines (e.g., 40 C.F.R. 1506.2);

(8) Cumulative impacts of the project and the failure of the EIA or EA to assess past and reasonably foreseeable future projects in the Upper San Joaquin;

(9) Since the project is not eligible for exemption from licensing, it must be assessed in light of a comprehensive plan for development (and preservation) for the watershed.

We respectfully submit that there is no evidence that the wildlife agencies would

adequately represent SOS' interests as to these issues; the Commission's implied finding to the contrary is clearly erroneous. The Order should be reversed on this ground alone.

V.

THE PROJECT IS NOT A NATURAL WATER FEATURE WHICH IS ELIGIBLE FOR EXEMPTION FROM LICENSING.

The statutory eligibility for exemption from licensing is for projects which utilize "natural water features without the need for a dam or impoundment." This project's dam is proposed to be constructed by grouting existing rocks in the stream. While the project would not involve a sizable reservoir, the forebay is proposed to be excavated (staff euphemism -- "inverted dam"), and its penstock would impound thousands of gallons of water. The Oxford English Dictionary defines "impound" as "1. a. to seize cattle, b. to shut up cattle in an enclosure. 2. To shut in, enclose, confine (a person or thing) as in a pound." We are aware of dicta in past FERC decisions interpreting

"impoundment" to mean reservoir. There is not a shred of legislative history to support such an interpretation. Instead, there is considerable evidence that the "natural water feature" exemption would be limited to water mill projects and perched lakes. The Conference Committee report which accompanied the Energy Security Act of 1980 required FERC to insure no adverse effect on natural water features at site, including water flow and water level, or on fish and wildlife. 1980 USCC&AN p. 2172. The only possible such prljects are water mills and perched lakes. We are aware of staff construction that this means "effects complained of bby Fish and Game", but such a strained construction violates the plain language of that Report. Neither a dam for mile of penstock are natural water features.

The Order seeks to insulate this Commission from judicial review of a plainly unlawful proposed action on the ground of allegedly late intervention. The Order could

have limited SOS' role; instead, it silences and ignores a critic of the imperial wardrobe. On this ground alone, we respectfully urge the Commission to reconsider and reverse the Order.

VI.

THERE WAS NO EVIDENCE TO SUPPORT THE COMMISSION'S IMPLIED FINDINGS AS TO UNDUE PREJUDICE, DELAY OR DISRUPTION OF THE TIMELY PROCESSING OF MEGA'S APPLICATION.

It is hornbook administrative law that findings must be supported by some evidence. The sentence in the Order, p. 3, preceding reference to fn. 9 is precisely that sort of speculation. Any number of things "might" happen. There is no evidence that they would happen, or that any effects of such impacts could not be strictly controlled by vigilant staff and an applicant as ably represented as Mega.

We concede that we would seek denial of Mega's application. There is no evidence to support a finding that such an outcome would

constitute "undue prejudice." Indeed, we submit that such a denial would be "due justice" rather than "undue prejudice."

There is no evidence as to delay. SOS promptly moved for coordinated hearing with the California State Water Resources Control Board which would have expedited the case, rather than to delay it, a point omitted by the Order. There was no evidence that granting the intervention would have disrupted the timely processing of the application. It would certinaly require more work to process a contested case than an ex parte case, but this is hardly evidence of "disruption". Instead of a scalpel of restriction of some rights, the Order employed the Draconian broad axe of denial of intervention. SOS had already agreed to accept the record as compiled prior to its intervention.

This Commission's staff, in its obsessive-compulsive approval of project after project, continues to ignore the caveat of the

Supreme Court that "... it cannot be assumed that the [Federal Power] Act commands the immediate construction of as many projects as possible." Udall v. FPC, 387 U.S. 428, 449 (1967).

VII.

NEED FOR POWER

The final Electricity Report VI of the California Energy Commission (CEC) is not yet in print for inclusion in this administrative record. However, that Commission adopted language for the Draft Report finding a potential oversupply of electricity in California over the next decade, threatening adverse consequences to both utilities and ratepayers. On February 9, 1987, CEC Chairman Charles R. Imbrecht testified before the California Natural Resources Committee that this state has no need for the power for any of the 225 hydroelectric projects for which state water rights are pending, which includes the Rock Creek Project. FERC staff was present

during this testimony by special invitation. Because the project is not statutorily eligible for exemption from licensing, it is not exempt from scrutiny on the need for power issue. There is no need for the project. The application should be denied.

CONCLUSION

We urge reconsideration and reversal of the Order Denying Appeal.

Respectfully submitted,

s/

Jerry Bishop

California Save Our Streams Council

Dated: February 24, 1987

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha G. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve

Mega Hydro, Inc.) Project No. 5756-006
)

ORDER DENYING APPEAL

(Issued January 28, 1987)

Background

An application for exemption from licensing for the Rock Creek Power Project No. 5756 was filed by Mega Hydro, Inc. (Mega) on November 15, 1984. 1/ The application was

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1/ The application was originally filed under the name of Resource Investments for an exemption from licensing. The exemption was granted (20 FERC Para. 61,224 (1982), but was invalidated by the decision in Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1984).

accepted and notice was issued on May 11, 1985. The notice, which was published in the Federal Register 2/ and in the local county newspaper. the Madera Tribune, set June 27, 1985, as the deadline for submitting comments, competing applications, and motions to intervene.

On June 17, 1986, California Save Our Streams Council. Inc. (SOS) filed a motion for late intervention in the proceeding. SOS alleged that good cause existed for its late intervention, because it did not receive actual notice of the application until after the time to intervene had expired, and because notice in the county newspaper, rather than the more widely read local paper published near the project site, was not a method likely to advise SOS of the application.

Mega filed an answer in opposition to SOS' motion to intervene on July 2, 1986. It

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2/ 50 Fed. Reg. 21648 (May 28, 1985).

contended that notice in the Federal Register was all that was legally required for constructive notice to exist. It also stated that the Madera Tribune, with a circulation of 23,000, provided better notice than the two local newspapers. 3/ Finally, it condtended that SOS had actual notice of the application ten months before it filed its motion to intervene, as evidenced by correspondence submitted with Mega's answer.

The Commission's Secretary issued a Notice Denying Late Intervention to SOS on July 30, 1986, finding that SOS had failed to show good cause in filing its motion to intervene late. SOS appealed the Secretary's action on August 18, 1986. SOS did not raise any new arguments in its appeal; rather, it incorporated by reference the argurments

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3/ It stated that one of the papers (now out of circulation) did not publish legal notices, and that the other one has a circulation of under 1,000.

contained it its motion to intervene.

Discussion

As noted in the Secretary's Notice Denying Late Intervention, under Rule 214 of the Commission's Rules of Practice and Procedure, good cause must be shown as to why the time limitation for intervention whould be waived. 4/

We believe the Secretary correctly determined that good cause did not exist to justify permitting SOS to intervene nearly one year out of time. First, SOS did not have good cause for failing to file in a timely manner. 5/ Notice of the project was published in the Federal Register, which provided constructive notice who might have been affected. 6 Also, while not required by law, the notice was published in the newspaper with the largest

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4/ 18 C.F.R. Sec. 385.214(b) (1986).

5/ 18 C.F.R. Sec. 385.214(d)(1)(i) (1986).

6/ See Federal Crop Ins. Corp. v. Merrill, 322 U.S. 380 (1947).

area circulation. In addition, as pointed out in the Secretary's Notice Denying Late Intervention, and which SOS has not challenged on appeal, SOS had actual notice of the application in mid-1985 and did not move to intervene until June 1986. Thus, even in the absence of notice in the Federal Register and Madera Tribune, SOS had notice of the application soon after the intervention deadline and should have moved for intervention in a more timely manner. 7/ Second, SOS has not demonstrated that its interests are not adequately demonstrated that its interests are not adequately represented by other parties in the proceeding such as the California

Department of Fish and Game and the U.S. Fish

7/ The failure to provide adequate formal notice is harmless if the complaining entity fails to act within a reasonable amount of time after receiving actual notice. See Torrey Associates, 35 FERC Para. 61,684 (1984), citing Northern Colorado Water Conservancy District v. FERC, 730 F.2d 1509, 1522-24 (D.C.Cir. 1984).

and Wildlife Service. 8/ Finally, grant of intervenor status to SOS at this point could cause undue prejudice to Mega and delay and disrupt the timely processing of Mega's application. 9/

The Commission orders:

The Save Our Stream [sic] Council Inc.'s appeal of the denial of its motion for late intervention is denied.

By the Commission.

(S E A L)

s/

Kenneth F. Plumb

Secretary

8/ 18 C.F.R. Sec. 385.214(d)(1)(iii) (1986).

9/ 18 C.F.R. Sec. 385.214(d)(1)(ii), (iv) (1986).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 4

[Docket Nos. RM88-21-000, RM86-5-000, RM 86-5-001; Order No. 503]

Amendment to Regulations Governing Exemption of Small Hydroelectric Power Projects of 5 Megawatts or Less

Issued:September 15, 1988

AGENCY: Federal Energy Regulatory Commission, DOE

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations governing exemption of small hydorelectric power projects of 5 megawatts (MW) or less by removing regulations that iomplemented the natural water feature exemption in sectior 408(b) of the Public Utility Regulatory Policies Act of 1978

(PURPA). These regulations were invalidated by the United States Court of Appeals for the Ninth Circuit in its Tulalip Tribes of Washington v. FERC (Tulalip decision, and they do not represent (and have not since the Tulalip decision) Commission practice with regard to natural water feature exemptions. In addition, the final rule grants in part, denies in part, and dismisses in part, a petition for rulemaking filed by the California Save Our Streams Council (CSOS). In so doing, the Commission also terminates Docket Nos. RM-86-5-000 and RM86-5-001

EFFECTIVE DATE: October 21, 1988

[INFORMATION SECTION OMITTED]

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon and Charles A. Trabandt.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is amending its regulations governing exemption of small hydroelectric

power projects of 5 megawatts (MW) or less. Specifically, the Commission is removing regulations that implemented the natural water feature exemption in section 408(b) of the Public Utility Regulatory Policies Act of 1978 (PURPA). These regulations were invalidated by the Ninth Circuit Court of Appeals in its Tulalip Tribes of Washington v. FERC (Tulalip) decision. 1/ The regulations do not represent (and have not since the Tulalip decision) Commission practice with regard to natural water feature exemptions. In addition, the final rule grants in part, denies in part, and dismisses in part, a petition for rulemaking filed by the California Save Our Streams Council (CSOS). 2/

1/ 732 F.2d 1451 (9th Cir. 1984)
2/ In so doing, the Commission also terminates Docket Nos. RM86-5-000 and RM86-001.

II. Background

The Energy Security Act of 1980 3/ amended sections 405 and 408 of PURPA to authorize the Commission to exempt sertain small hydroelectric power projects from Part I of the Federal Power Act. 4/ section 408(b) of PURPA provides that the definition of small hydroelectric power project includes:

any project which utilizes or proposes to utilize natural water reatures for the generation of electricity, without the need for any dam or impoundment, in a manner which (as determined by the Commission) will acheive the purposes of this title and will do so without any adverse effect upon such natural water features. 5/

3/ Publ. L. 96-294, 94 Stat. 611
4/ 16 U.S.C. 791a-825r (1982)
5/ 16 U.S.C. 2708(b) (1982)

The Commission originally implemented the natural water feature exemption in section 408(b) of PURPA on a case-by-case basis. 6/ In 1982, after two years of experience with case-specific exemption procedures, the Commission amended its regulations by rule (Order No. 255) to provide specific guidance on what constitutes a natural water feature project. 7/

A. Order No. 255 and the Tulalip Decision

In Order No. 255 the Commission defined small hydroelectric power project as any project that:

6/ Exemption From All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts or Less, Order No 106, 45 FR 76,115 (Nov. 18, 1980) FERC Stats. & Regs. [Regulations Preambles 1977-1981] Para. 30,204 (Nov. 7, 1980).

7/ Amendments to Regulations Governing Case-by-Case Exemption From All or Part of Part I of the Federal Power Act for Small Hydroelectric Power Projects With An Installed Capacity of 5 Megawatts or Less, Order No. 255, 47 FR 38506 (Sept. 1, 1982), FERC Stats. & Regs. [Regulations Preambles 1982-1985] Para. 30,387 (Aug. 27, 1982)

(i) Would utilize for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream, without the need for a dam and man-made impoundment;

(ii) Would not retain water behind any structure for the purpose of a storage and release operation; and

(iii) Except as otherwise permitted under Sec. 4.103(d)(2) [waiver provision], would contain a diversion or intake structure that:

(A) Is not higher than two times the diameter of the penstock or intake pipeline, not to exceed ten feet in total height, as measured from the lowest point of the natural streambed at the downstream toe of the structure to the normal water surface level retained by the structure assuming a no-spill condition;

(B) Does not retain more than two acre-feet (2467 cubic meters) of water behind the diversion or intake structure;

(C) Does not increse the existing naturally occurring hydraulic head of the natural water feature more than five (5) percent. 8/

This definition of a natural water feature was challenged in, and Sec. 4.102(l)(iii)(A) and (B) were invalidated by, the U.S. Court of Appeals for the Ninth Circuit in the Tulalip decision. 9/ The Ninth Circuit found that the Commission, by defining natural water feature to include structures up to ten feet in height that retain up to two acre-feet of water, authorized exemptions for structures that were within the plain meaning of "any dam or impoundment."

8/ 18 CFR 4.102(l)(iii)(A),(B) (1983), 47 FR 38506 at p. 38512. Section 4.102(l) was redesignated in Order No. 413 (discussed infra) as Para. 4.30(b)(27). See Application for License, Permit and Exemption From Licensing for Water Power Projects, Order No. 413, 50 FR 11,658 (Mar. 25, 1985), FERC Stats. & Regs. [Regulations Preambles] Para. 30,362 (Mar. 20, 1985).

9/ See 18 CFR 4.102(a)(l)(iii)(A), (B) (1983).

The Ninth Circuit also addressed the definition of "dam" in Sec. 4.102(a) for exemption purposes. The Commission defined "dam" (for the purpose of the provisions governing exemption of small hydroelectric power projects) as "any structure for impounding water which is usable for electric power generation if the impoundment supplies all, or the substantial part of, the total hydroelectric pressure (head) developed for such generation." 10/ The Ninth Circuit quoted this definition and then noted the overlap between the definition of dam and the provisions implementing natural water feature exemptions. The Court stated:

* * * in its final rule the Commission defined "dam" to exclude "dams" which are built only to divert rather than to create hydroelectric pressure. 18 CFR 4.102(a) (1983). In conjunction with this definition of "dam," the final rule authorizes exemptions for projects that utilize a "diversion structure" no higher than ten feet and which "retains" no more than

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10/ See 18 CFR 4.102(a) (1983). This definition was promulgated by the Commission in Order No. 255, supra note 7.

two acre-feet of water. 18 CFR 4.102(1)(2)(iii)(A) and (B).

In view of the overlap between the definition of dam and the invalid height and water retention provisions, the Commission considered the definition of dam to have been invalidated by the Ninth Circuit. 11/

B. The Commission's Response to the Tulalip Decision

The Tulalip decision was issued on May 10, 1984. On July 18, 1984, the Commission issued four orders 12/ that sought to resolve the status of issued and applied-for natural water feature exemptions in light of the Tulalip decision. 13/ The Eagle Power,

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11/ See 18 CFR 4.102(a) (1983). This definition was promulgated by the Commission in Order No. 255, supra note 7.

12/ Eagle Power Co., et al., 30 FERC Para. 61,253 at p. 61,501-52. The invalidated definition of dam in Sec. 4.102(a) was redesignated as Sec. 4.30(b)(4)(iii) in 1985. See Order No. 413, supra note 8.

13/ The Commission's review of exemption projects included exemptions issued on a case-by-case basis prior to August 27, 1982, the

Snowbird, and Forward Power orders are briefly summarized below. For the purposes of this proceeding, the most important of the July 16, 1984 orders is the Pigeon Cove order because it explains how the Commission decided to implement section 408(b) of PURPA after the Tulalip decision.

1. The Eagle Power Order

Eagle Power was concerned with projects for which exemptions had been issued and that were in various stages of construction. 14/ The Commission allowed projects that were under construction as of May 10, 1986 to proceed under their existing exemptions. For those projects that were not under construction as of May 10, 1984, the Commission applied Tulalip retroactively and the exemptions for such

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date on which the regulations invalidated by Tulalip were promulgated. See Order No. 255, supra note 7.

projects were vacated. 15/ In order to minimize the burden on developers who had obtained their exemptions under the rules invalidated by Tulalip, the Commission afforded these former exemptees the opportunity to restore their applications with their original (one accepted) filing dates. The former exemptees were given 120 days to either convert their applications to license applications or to amend their applications to license applications or to amend their applications to comply with the statutory definition of natural water feature as construed by the Ninth Circuit in Tulalip.

2. The Snowbird Order

In its Snowbird order, the Commission addressed exemption applications that were

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15/ The Commission chose the beginning of physical construction activity as the line of demarcation for projects that were "under construction" as of May 10, 1984; 28 FERC at p. 61,114.

filed but not accepted for filing at the time of the Tulalip decision. 16/ The Commission dismissed all unaccepted applications as invalid. As with those projects that were not under construction in Eagle Power, the Commission afforded developers with applications that had been accepted for filing with an opportunity to either convert their applications to license applications or amend their applications to comply with Tulalip.

3. The Forward Power Order

The Commission's Forward Power order dealt with those projects that were constructed and operating at the time of the

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16/ Snowbird, Ltd., et al., 28 FERC Para. 61,062 (1984).

Tulalip decision. 17/ The Commission applied the Supreme Court's Chevron test for retroactive application of a new rule and did not apply Tulalip retroactively to exemption projects that were constructed and operating as of May 10, 1984. 18/

4. The Pigeon Cove Orders

In Pigeon Cove I, the Commission determined which issued exemption applications used valid natural water features under the

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17/ Forward Power and Energy Co., et al. 28 FERC Para. 61,063 (1984).

18/ See Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971).

Tulalip decision. 19/ The Commission stated that the Tulalip decision "return[ed] the Commission to the statutory language [section 408(b) of PURPA] governing natural water feature exemptions." 20/ The Commission construed the statutory definition of a natural water feature exemption in section 408(b) of PURPA as a three=part test. A project may be exempted under section 408(b) if it uses a natural water feature to generate electricity that: (1) Does not need any dam or impoundment, (2) acheives the purposes of Title IV of PURPA, and (3) does so without any adverse effect upon such natural water features.

Regarding diversion structures, the Commission stated in Pigeon Cove I that:

> The court in Tulalip pointed out that projects using natural water features such as a perched lake or water fall qualify under the statutory provision. However, virtually any

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19/ 28 FERC Para. 61,064 (1984).

20/ 28 FERC at p. 61,129.

system for generating electricity by passing water through a turbine, even if it uses water from a waterfall or perched lake, must have some means to move the water from the streambed or lake to the turbine. Thus, while the court clearly ruled out diversion structures that serve to dam or impound water, if the statutory provision is to have any meaning it must allow diversion devices that neither dam or impound water, so long as they also satisfy the other two criteria in Section 408(b). 21/

Including all forms of diversion structures within the definition of "dam" would eliminate natural water feature exemptions and would therefore thwart the Congressional intent of promoting small hydropower projects. 22/ The Commission applied the three=part test of section 408(b) and determined that 78 projects complied with the statutory definition of a natural water feature as construed by the Ninth Circuit in Tulalip.

21/ 28 FERC at p. 61,210.

22/ The Ninth Circuit clearly recognized in Tulalip that Congress sought to encourage and expedite small hydropower development but confined exemptions to sites requiring no new dam or impoundment.

Petitions for rehearing of Pigeon Cove I were filed, and on March 6, 1985, the Commission issued a second order (Pigeon Cove II). 23/ Petitioners claimed that the Commission failed to articulate criteria for determining which projects were eligible for a natural water feature exemption. Petitioners contended that some projects could be considered eligible under Pigeon Cove, yet still be inconsistent with the limits put on natural water features in the Tulalip decision. The Commission disagreed and adhered to its three-part test under section 408(b) of PURPA. In answering the petitioners' claims, the

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23/ 30 FERC Para. 61,253 (1985). Petitions for rehearing were also filed in the Snowbird and Eagle Power orders. The Commission considered these petitions in a separate order also issued on March 6, 1985. Eagle Power Co., et al. 30 FERC Para. 61,254 (1985) (Eagle Power II). A final order in this series was issued on June 18, 1985. Eagle Power Co., et al., 31 FERC Para. 61,314 (1985) (Eagle Power II).

Commission explained further its interpretation of the first criterion of of section 408(b) that the project generate electricity without the need for any dam or impoundment.

The Commission noted that, as a result of the Tulalip decision, projects using perched lakes or waterfalls must have some structure for diverting water into a turbine in order to produce electricity, and that all diversion structures cannot be considered dams per se. The dictionary definitions of "dam" used in Tulalip generally described a structure that blocks the flow of water; therefore the Commission considered any raised structure spanning the entire width of a stream to be a dam and ineligible for exemption.

The question left unanswered in Tulalip wasd whether a diversion structure that did not span the entire width of a stream should be considered a dam. The Commission explained that a diversion structure that spans most of the width of a stream can effectively block natural

flow depending on its size, displacement and design. The Commission stated, in its case-by-case review of the projects in Pigeon Cove I, that it considered such a project to be ineligible for exemption.

With respect to diversion structures that only partially cross the width of a stream, the Commission determined that such structures often do not significantly block the natural flow, particularly if the structure is located on the shallower side of the streambed so that the water mainly flows around the deeper side. Thus, some individual projects were deemed qualified for an exemption. The Commission noted that catch-basins imbedded in the streambed, and catch-basins, perforated pipes and small wing-walls located on the bank of a stream, essentially act as intakes through which water flows into a turbine and could, consequently qualify for an exemption.

Therefore, with regard to the first criterion of section 408(b) of PURPA (i.e.,

that the project generate electricity without the need for any dam or impoundment), the Commission considered the following diversion structures to be ineligible for exemption: (1) Raised diversion structures that span the entire width of the stream, and (2) diversion structures that partially cross a stream and that significantly block the natural flow. For diversion structures that do not significantly block the natural flow, the Commission reviewed such projects on a case-by-case basis. Moreover, while Tulalip only dealt with the first criterion in section 408(b) of PURPA, the Commission indicated that even if a diversion structure was not a "dam or impoundment" (i.e., consistent with Tulalip), it still had to meet the remaining requirements of section 408(b) before it would be eligible for exemption (i.e., that the project will generate electricity in a manner consistent with PUPRA [sic] and that it will do so without any adverse effect upon such natural water

features). In addition, by focusing on diversion structures that do not significantly block the natural flow, the Pigeon Cove orders used an approach that was consistent with the definition of "dam" that was promulgated in 1980 in Order No. 106. 24/

Thus, the Commission's response to the Tulalip decision was three-fold: (1) It returned to the statutory definition of a natural water feature, (2) it reviewed all issued and applied-for exemptions for consistency with that definition, and (3) with regard to future natural water feature exemption applications, it returned to a case-

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24/ Order No. 108 defined "dam" for the purpose of the provisions governing exemption of small hydroelectric power projects, as "any structure for impounding water, including any diversion structure that is designed to obstruct all ar substantially all of the flow of a natural body of water." Order No. 106, supra, note 6, 45 FR at 76124. This definition of dam was used by the Commission from 1980 until 1982. On August 27, 1982, the Commission issued Order No. 255, supra note 7, which changed the definition o the definition that was subsequently invalidated by the Tulalip decision.

by-case approach as enunciated in the Pigeon Cove orders.

III. Discussion

A. Order No. 413 and the Tulalip Decision

The Pigeon Cove II order was issued on March 6, 1985. On March 20, 1985 the Commission issued a final rule in Docket No. RM83-56-000, Order No. 413. 25/ Order No. 413 was a comprehensive rulemaking that made several changes to the Commission's hydroelectric licensing regulations. At the

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25/ Application for License, Permit, and Exemption for Licensing for Water Power Projects, Order No. 413, 50 FR 11656 (Mar. 20, 1985).

time Order No 413 law issued [sic], the Commission had responded to the Tulalip decision and had decided to implement the natural water feature exemption on an case-specific basis using the principles enunciated in the Pigeon Cove orders. Consequently, Order No. 413 would have been an appropriate proceeding in which to revoke the regulations invalidated by the Tulalip decision.

However, the Commission did not, in Order No. 413, remove from its regulations the provisions invalidated by the Tulalip decision. Instead, the Commission redesignated these provisions as Secs. 4.30(b)(4)(iii) and 4.30(b)(27(iii)(C)(1) and (2). In referring to the provisions invalidated by Tulalip, the Commission noted that:

> In a recent decision, [Tulalip] * * * the Ninth Circuit found certain provisions of Sec. 4.102 to be invalid. Section 4.102 defines requirements for application for exemption from licensing for small hydorelectic power projects. As part of the reorganization, the final rule redesignates these provisions. However, by redesignating these provisions, the

Commission is not reaffirming their validity. The Commission will respond to the Court's finding in a separate proceeding.[26/]

The fact that the provisions invalidated by the Tulalip decision have not been removed from the Commission's regulations is an oversight that the Commission is correcting in this rule. Consequently, the Commission is removing these provisions from its regulations and is revising Secs. 4.30(b)(4)(iii), 4.30(b)(27) and 4.103(c).

B. Petition for Rulemaking by CSOS

On December 18, 1985, the Commission received a petition for rulemaking (Docket No.

26/ 50 FR at 11659 n. 8. The Commission did not elaborate on whether the "separate proceeding" meant a future rulemaking or the Pigeon Cove II order issued two weeks before. In either event, the invalidated regulations have not been followed or enforced by the Commission since the Tulalip decision. The Commission implements section 408(d) of PURPA on a case-by-case basis using the approach stated in the Pigeon Cove orders.

RM86-5-000) from California Save Our Streams Council (CSOS). CSOS requested that the Commission issue a notice of proposed rulemaking (NOPR) that would: (a) implement Executive Order No. 11991, and (b) limit the "natural water feature" exemptions in section 408(b) of PURPA to projects not involving off-stream diversions, such as water mills.

On January 12, 1988, the Commission received a second petition for rulemaking (Docket No. RM86-5-001) from CSOS entitled "Petition Rehearing of De Facto Denial of Petition for Rulemaking, Suspension and Repeal of Rules, Revocation of Exemption Licensing and Suspension of Exemptions from Licensing Pending Rehearing." In its January 12, 1988 filing, CSOS dropped its request to implement Executive Order No. 11991 but continued to claim that the following regulations are in excess of the Commission's power to exempt projects from licensing under the FPA: Secs. 4.30)b)(4); 4.30(b)(22); 4.103(c)(1) and 4.111(a)(1). CSOS

requests the Commission to: (1) Grant rehearing of the alleged denial of the petition for rulemaking and adopt a rule defining natural water features to conform to statutory authority, (2) revoke case-specific exemptions issued under Order No. 413, (3) suspend and revoke the foregoing regulations, and (4) suspend the processing of pending applications for exemption without prejudice to convert to license applications. Except for removing the provisions invalidated by the Tulalip decision from its regulations, the Commission denies the petition filed by CSOS.

1. Executive Order No 11991

Executive Order No. 11991 directed the Council on Environmental Quality (CEQ) to issue

regulations implementing the National Environmental Policy Act of 1969 (NEPA). 27/ The CEQ regulations implementing NEPA are contained in chapter 40 of the Code of Federal Regulations. 28/ Section 1507.3(a) provides for all Federal agencies to adopt procedures to supplement the CEQ regulations implementing NEPA. On December 10, 1987, the Commission issued Order No. 486 (Docket No. RM-87-15-000), which revised its regulations implementing NEPA. 29/ Order No. 486 renders moot CSOS' request to implement Executive Order No. 11991. Accordingly, to that [sic] CSOS' petition for rulemaking is dismissed as moot.

27/ 42 U.S.C. 4321-4370a (1982)

28/ 40 CFR Part 1500-1506 (1987)

29/ Regulations Implementing the National Environmental Policy Act of 1969, Order No. 486, 52 FR 47897 (Dec. 17, 1987), III FERC Stat. and Regs. Para. 30,783 (Dec. 10, 1987). CSOS had the opportunity to, and did, file separate comments in that proceeding. (Docket No. RM87-15-000).

2. Natural Water Feature Exemptions

CSOS states in its January 12, 1988 filing that "the Commission re-enacted definitions of 'natural water feature' virtually identical to those invalidated by Tulalip." However, as explained above, the Commission merely redesignated the provisions invalidated by the Tulalip decision in Order No. 413; it did not "re-enact" them and, by this order, we are formally deleting those provisions from the regulations. The Commission determines whether a project qualifies for a natural water feature exemption on a case=by-case basis using the criteria stated in the Pigeon Cove orders.

While CSOS characterizes Order No. 413 as "re-enacting" the provisions invalidated by the Tulalip decision, CSOS's primary objection is with the approach to natural water feature exemptions taken by the Commission in the Pigeon Cove orders. CSOS believes that Tulalip

decision requires all diversion structures to be ineligible for exemption as a natural water feature. CSOS contends that "the only non-retrofit projects eligible for exemption from licensing are natural water features such as a perched lake or paddle mill." 30/ However, as discussed at length above, these issues were resolved in the Pigeon Cove orders.

CSOS could have pressed its claims by intervening in the Pigeon Cove proceedings. CSOS did not, however, intervene in the Pigeon

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30/ January 12, 1988 filing of CSOS, p. 2.

Cove proceedings and it cannot collaterally attack those orders here. 31/ Section 405(d) of PURPA specifically gives the Commission the authority to exempt small hydroelectric power projects on either a generic basis by rule or on a case=by=case basis. The Commission returned to a case-by-case approach after the Tulalip decision. CSOS always has the option to intervene and state its position in any specific exemption application.

In its January 12, 1988 filing CSOS also states that the "Commission's rule 4.30

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31 The Commission notes that the claims of CSOS in its petition for rulemaking and the claims of petitioners' in the Pigeon Cove II rehearing order and that these issues have been decided. The Commission also notes that CSOS did not participate in any of the rulemaking proceedings that led to the final rules in Order No. 105 (19800, Order No. 255 (1982) and Order No. 413 (1985),

appropriately defines a dam as 'any structure for impounding or diverting water'." 32/ CSOS is paraphrasing the definition of dam in Sec. 4.30(b)(4(i) of the Commission's regulations that governs applications for a license of a major project at an existing dam. The Commission interprets CSOS statement as a request to define "dam," for exemption purposes, in the same manner (i.e., as any structure for impounding or diverting water").

CSOS' proposed definition would have the effect of including all forms of diversion structures within the definition of "dam." This is a position that the Commission clearly rejected in both of the Pigeon Cove orders. The Commission determined therein that raised diversion structures that span the entire width of the stream or diversion structures that significantly block the natural flow

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32/ January 12, 1988 filing of CSOS, p. 1.

(i.e., a diversion strucure that either dams or impounds water) are ineligible for exemption. Diversion structures that do not significantly block the natural flow may be eligible for exemption provided that they can satisfy the other two criteria in section 408(b) of PURPA.

CSOS has not raised any issues of fact, law or policy that were not considered in the Pigeon Cove orders or that persuade the Commission to alter the determinations made in those orders. The Pigeon Cove orders implement section 408(b) of PURPA in a manner consistent with the Tulalip decision, and consistent with the definition of dam that had been promulgated in the Commission's regulations in 1980 in Order No. 106. That definition was the product of a rulemaking proceeding, and was used by the Commission without objection until it was superseded in 1982 by the definition that the Ninth Circuit subsquently invalidated in Tulalip. By this final rule, in addition to formally deleting the regulatory provisions

invalidated in Tulalip, we complete the process of restoring the status quo ante by formally reinstating in Sec. 4.30(b)(4)(iii) of the regulations, the definition of dam that had been in the regulations before it was superseded by the definition invalidated in Tulalip.

3. Specific requests of CSOS

CSOS requests that the Commission define natural water feature in a manner that "conform[s] to statutory authority." 33/ The Commission does not have to define natural water feature to "conform to" statutory authority because it has already returned to the statutory language of section 408(b) of PURPA in the Pigeon Cove orders.

CSOS also wants the Commission to revoke all case-specific exemptions "issued under Order 413." 34/ By this, the Commission

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33/ January 12, 1988 filing of CSOS p. 2.

assumes CSOS means all case-specific exemptions issued under the regulations that were invalidated by the Tulalip decision. In fact, the Commission has issued no case-specific exemptions under those regulations. The regulations have been invalid and of no effect since the Tulalip decision and they do not (and since Tulalip did not) represent Commission practice with regard to natural water feature exemptions.

Finally, CSOS asks the Commission to suspend processing all exemption applications

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34/ Id.

in order to convert applications to "license application[s]." 35/ This request illustrates that CSOS' primary objection is with the Commission's response to the Tulalip decision and the Pigeon Cove orders. 36/ The Commission did, in fact, give developers the opportunity to convert issued and applied-for exemptions that were invalid under Tulalip to license applications in the Eagle Power and Snowbird orders. 37/

In objecting to the provisions redesignated in Order No. 413, CSOS cites to Secs. 4.30(b)4) and 4.30(b)(22)(ii) of the Commission's regulations and not to the redesignated provisions (i.e., Sec. 4.30(b)(27)(ii)(C)(1) and (2)). The Commission interprets CSOS' cite to Sec. 4.30(b)(4) as a

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35/ Id.

36/ See cased [sic] cited supra note 10.

37/ The Pigeon Cove I order only applied to those exemptions that utilized valid natural water features in light of Tulalip.

cite to Sec. 4.30(b)(4)(iii). Section 4.30(b)(4)(iii) contains the invalid definition of "dam" that was redesignated in Order No. 413. To the extent CSOS' second filing objects to the invalid provisions in Secs. 4.30(b)(4)(iii) and 4.30(b)(27)(ii)(C)(1) and (2), this order grants CSOS' request to revoke those regulations. As discussed above, this order also reinstates in Sec. 4.30(b)(4)(iii) the original definition of dam. For the reasons discussed below, the Commission denies CSOS' request for relief with respect to Secs. 4.30(b)(22)(ii) and 4.103(c)(1) and dismisses CSOS' request for relief with respect to 4.111(a)(1).

(i) Section 4.30(b)(22)(ii). Section 4.30(b)(22)(ii) defines "project" for the purposes of an application for exemption of a small hydroelectric power project to include "any diversion structure other than a dam and any associated water conveyance facility, power plant, primary transmission line, and other

appurtenant facility if a natural water feature other than a lake or similar natural impoundment is used for power generation." This definition of "project" was established by the Commission Order No. 106, which also separately defined "small hydroelectric power project." 38/

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38 Exemption from All or Part of Part I of the Federal Power Act of Small Hydroelectric Power Projects With An Installed Capacity of Five Megawatts of Less, 45 FR 76115 (Nov. 18, 1980) FERC Stats. & Regs. [Regulations Preambles 1977-1981] Para. 30,204 (Nov. 7, 1980).

The preamble to Order No. 106 indicates an intent to define "project" more narrowly than the definition of "project" in section (3)(11 of the FPA. 39/ Under section (3)(11) of the FPA a "complete unit of development" might include more than one impoundment and a series of hydraulically coordinated dams. Therefore, a narrower definition of project was adopted to exclude all dams, impoundments and powerhouses in a large coordinated unit of development. "Small

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39/ Section 3(11) of the FPA defines "project" as a complete unit of improvement or development consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines tranmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.
16 U.S.C. 796 (1982)

hydroelectric power project" was separately defined as either a project that would use the water power potential of an existing dam to generate electricity or a project that would generate electricity using a natural water feature without the need for a dam or man-made impoundment.

CSOS' reasons for objecting to Sec. 4.30(b)(22)(ii) are not clear. Section 4.30(b)(22)(ii) was not affected by the Tulalip decision. Section 4.30(b)(22)(ii) was promulgated in Order No. 106 in 1980. The regulations that were invalidated by the Tulalip decision were promulgated in 1982 in Order No. 255 and Order No. 255 did not amend the definition of project in Sec. 4.30(b)(22)(ii). CSOS has not articulated any reason for objecting to Sec. 4.30(b)(22)(ii), and we do not perceive any reaon to amend or revoke it. Accordingly, CSOS' request to revoke the regulation is denied.

(ii) Section 4.103(c)(1). CSOS alleges that Sec. 4.103(c)(1) is invalid under the FPA. Section 4.103(c)(1) provides for waiver of the provisions in Secs. 4.102 through 4.107 of the Commission'sregulations (i.e., the regulations governing case-specific exemptions from licensing). Section 4.103(c)(1) is well within the Commission's authority under sections 405 and 408 of PURPA. We construe CSOS' intent as objecting to the second paragraph in Sec. 4.103(c), which allows an applicant to receive a waiver of the regulations that were invalidated by the Tulalip decision. 40/ Again, to the extent CSOS is requesting revocation of Secs. 4.103(c)(2) and not Sec.4.103c)(1), our order today grants CSOS' request. These regulations do not and have not represented Commission practice since the Pigeon Cove orders.

(iii) Section 4.111(a)(1). Finally, CSOS

40/ That is the height and water retention limitations in Secs. 4.30(b)(27)(ii)(c)(1),(2).

requests that the Commission revoke Sec. 4.111(a)(1) of its regulations. This request is moot, and therefore is dismissed. Section 4.111 was removed from the Commission's regulations on October 20, 1987. 41/

IV. Environmental Statement

Commission regulations require that an environmental assessment or an environmental impact statement must be prepared for any Commission action that may have a significant adverse effect on the human environment. 42/ The Commission has categorically certain actions from this requirement as not having a significant effect on the human environment. 43/ No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural or that does not substahtially change the effect

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41/ See Exemption from Licensing Requirements of Part I of the Federal Power Act of a Category of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts of less, 52 FR 39628 (Oct. 23, 1987); III FERC Stats. & Regs. Para. 30,771 (Oct. 20, 1987).

of legislation or regulations being amended. 44/ This final rule is corrective in nature. The rule simply removes invalid, outdated provisions from the Commission's regulations.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 45/ requires rulemakings to either contain a description and analysis of the impact the rule will have on small entities or certify that the rule will not have a significant economic impact on a substantial number of small entities. This final rule will have no economic impact on small entities. The rule merely revokes invalid regulations that have

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42/ Regulations Implementing Nation [sic] Environmental Policy Act, 52 FR 47,987 (Dec. 17, 1987), III FERC Stats. & Regs. Para 30,783 (Dec. 10, 1987).

43/ 18 CFR 380.4 (1987).

44/ 18 CFR 380.4(a)(2)(ii) (1987).

45/ 5 U.S.C. 601-612 (1982).

not represented Commission practice since 1984.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) 46/ and the Office of Management and Budget's (OMB) regulations 47/ require that OMB approve certain information collection requirements imposed by agency rule. This final rule does not impose any information collection requirements.

VII. Notice and Comment and Effective Date

The Administrative Procedure Act (APA) 48/ requires rulemakings to be published in the Federal Register. The APA also mandates that an opportunity for comment to be provided when an agency promulgates regulations. Notice and Comment are not required under the APA when the "agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public

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46/ 44 U.S.C. 3501-3520 (1982).

47/ 5 CFR 1320.13 (1987).

interest." The Commission finds that notice and comment are unnecessary for this rulemaking. The Commission is merely removing certain provisions from its regulations that are invalid and have been of no effect since the Tulalip decision. This rule is effective October 21, 1988.

List of Subjects in 18 CFR Part 4

Electric power, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Part 4, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

Lois D. Cashell,

Secretary.

48/ 5 U.S.C. 551-559 (1982).

49/ 5 U.S.C. 553(b)(B) (1982)

contained it its motion to intervene.

Discussion

As noted in the Secretary's Notice Denying Late Intervention, under Rule 214 of

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

In the matter of the Application for Exemption for the Rock Creek Project Proposed by Mega Hydro, Inc.	))))	No. 5756-003

PROTEST AND MOTION TO INTERVENE

1. Statement of Interest. California Save Our Streams Council, Inc. (SOS) is a Cailfornia non-profit corporation having its principal place of business in North Fork, California. Its members use California streams, including Rock Creek, for recreational purposes, including hiking, fishing, nature study, photography and swimming.

SOS has Mono Indian members who use the stream area to collect fish and plant materials for food and spiritual purposes. Ortheological [Archeological] resources exist in the project area which may be impacted.

2. Nature of the Injury. Construction of the Rock Creek Project would irreversibly and iretrievably alter approximately one mile

of Rock Creek by reducing natural water flows and levels. The bypassed section includes riparian habitat which may be altered or injured by reducing natural water flows and levels. The bypassed section includes riparian habitat which may be altered or injured by reduction in flow. The project traverses a deer migration route and the project has the potential to impede deer migration. The bypass area includes a population of Collomia Rawsonia, a rare plant which is presently a candidate for Threatened and Endangered Species listing, presently suspended due to a Conservation Agreement preventing this project at present.

The bypass area includes two exceptionally beautiful waterfalls, known locally as the "Chutes" and the Big Rock Creek Falls. Bypassing water will reduce the beauty and excitement of watching seasonally changing flows at these falls. The resulting in-stream flows will approximate low flows of late summer

for most of the year if the project is built.

Operation of the project will reduce the natural ambience of the creek and its value for spiritual renewal for Mono Indians of the North Fork area.

Construction of the project will convert a roaded natural area to one of intense industrial activity, involving blasting and heavy equipment operation. Mitigations of re-vegetation are conjectural and speculative due to soil and precipitation conditions in the area.

3. Need for Power. If permitted to intervene, SOS would establish that Southern California Edison does not have a need for the project power which cannot be met by preferable technologies. The project conflicts with Edison's need for dispatchable power and reliable capacity during May-September. Requiring SCE to purchase project power off-peak may require it to curtail load following plants below the level at which they may be

reliably dispatched the following day. Acceptance of project power may cumulatively require Edison to curtail its nuclear plants, which is undesirable from both a safety and reatepayer standpoint.

4. Cumulative Impacts. The project has the potential for both additive and synergistic cumulative impacts to the human environment in the San Joaquin basin with past, present and future projects, including existing projects of Edison and P.G.&E.

5. Irreversible and Irretrievable Commitment of Resources. Approval and construction of the project will consume the human resources of capital, labor, energy and material and preclude their availability for conservation or preferred alternate technologies which more closely match Edison's demand.

Because an exemption is perpetual, approval will irreversibly commit the natural existing quality of Rock Creek to a degraded

recreational quality dominated by energy production.

6. Ineligibility for Exemption. The proposed project is not a "natural water feature" authorized for exemption. The proposed penstock will impound 111,080 gallons of water which is an impoundment disqualifying the project for exemption from licensing.

The Commission has not adopted any rules defining "natural water features" since the Tulalip Tribes case. The former chairman of the Commission has testified to a congressional committee that: "No exemptions will be granted until further orders are issued by the Commission."

7. Small Hydro Program. Hearing Before the Subcommittee on Energy Conservation and Power, September 11, 1984, page 304.

SOS presently has a Petition for Rulemaking pending before the Commission to define "natural water features" consistent with Congressional intent. (No. 86-005) Approval

of exemption in this case would be a de facto denial of that petition without rulemaking as provided by the Administrative Procedure Act. SOS maintains that only the water mill technology (e.g. Hydro-Mite) can produce electricity without the need for a dam or diversion of water. See also Paragraphs 62,049. QF-86-72-000 (paddlewheel)

Approval of this project for exemption would constitute a precedent for future exemptions which require an assessment of significance under NEPA.

WHEREFORE, SOS prays for relief as follows:

(1) that its motion to intervene be granted;

(2) that the application for exemption be denied.

Dated: June, 1986

s/

Jerry Bishop, President

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

In the matter of the Application for Exemption for the Rock Creek Project Proposed by Mega Hydro, Inc.	))))	No. 5756-003

Motion for Late Intervention

California Save Our Streams Council, Inc. (SOS) moves for late intervention as follows;

1. On June 11, 1986, J.V. Henry, Agency Affairs Coordinator of SOS, spoke by telephone with Mr. Mohammed Akbar of the FERC. Mr. Akbar advised: (1) that the project notice was advertised in the Madera Tribune; (2) that the comment period expired in June, 1985; and (3) that a petition to intervene would be dismissed in 30 days unless the Commission chose to accept it.

2. The Madera Tribune is published 47 miles from North Fork and is not generally read in North Fork.

3. In June, 1985, there were two weekly

newspapers generally read in North Fork: the North Fork Journal and the North Fork Neighbor. To SOS' knowledge, there was no notice of the application for exemption comment period in either paper, either by ad or press release.

4. No officer or agent of SOS had actual knowledge of the notice during the comment period.

5. SOS' interest in and opposition to the Rock Creek Project was well known to FERC staff and the applicant. SOS actively participated in meetings involved in preparing FERC EIA-0001, Final Environmental Impact Analysis of Small-scale Hydroelectric Development in Selected Watersheds in the Upper San Joaquin Basin, California. SOS commented extensively on that EIA.

6. Neither staff nor the applicant notified SOS of the amended application prior to the expiration of the comment period.

7. There will be no prejudice to the applicant nor undue delay in the proceedings if

SOS is granted late intervention.

8. The critical delay associated with this exemption is the Conservation Agreement between the U.S. Forest Service and U.S. Fish and Wildlife Service regarding Collomia Rawsonia, a former candidate for listing as a Threatened and Endangered species (EIA, pp. A-4, A-5, App. B)

The U.S. Forest Service has agreed to "Restrict construction of hydroelectric development within essential habitat described in attachment." (EIA, p. B-4) Item 15 of the attachment (EIAm p. B-9), and Figure 7 (EIA, B-16) encompass a portion of Rock Creek which this applicant proposes to develop.

SOS has been advised that the studies described in the Conservation Agreement will not be completed until at least 1987.

Thus, the Commission could resolve issues raised by SOS other than Collomia Rawsonia, while awaiting completion of those studies, without prejudice to applicant or undue delay

of the proceeding.

9. Issuance of an exemption prior to completion of the Collomia Rawsonia studies would be a breach of the Commission's duty to consider all relevant factors prior to decision established by the Federal Power Act and more fully defined by Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F. 2d 466 (9th Cir. 1984)

While that case involved licensing, exemption is even more prejudicial because it is perpetual.

Further, issuance of an exemption prior to completion of the Collomia Rawsonia studies would constitute a major federal action under NEPS and would violate Section 4(b)(3)(B) of the Endangered Species Act.

Issuance of an exemption with "subsequent mitigation" conditions would not only violate Yakima, supra, but the principle that a lead agency may not rely on another agency's evaluation of environmental effects under NEPA.

Southern Oregon Citizens Against Toxic Sprays v. Clark, 720 F 2d 1475 (9th Cir, 1983)

10. At a minimum, NEPA due process requires actual notice to the affected public to comment on the need for an EIS. Hanly v. Kleindienst, 471 F 2d 823 (2d Cir. 1972), cert. den. 412 U.S. 908. That due process would be curtailed if this motion were denied on the basis of the Madera Tribune legal advertisement.

SOS has timely intervened in projects when it has received actual notice.

11. In brief, publication in the Madera Tribune was not a method likely to advise SOS and North Fork residents of a comment deadline. Granting a motion for late intervention will not prejudice the applicant nor cause undue delay in this proceeding.

Granting the motion will be in the public interest to allow consideration of the need for power issue and alternatives, cumulative impacts, recreation, cultural resources, and the legal eligibility of the project for exemption.

Respectfully submitted,

s/

J.V. Henry

Agency Affairs Coordinator

Dated: June, 1986

Supreme Court, U.S.
FILED
APR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1442

In the Supreme Court of the United States

OCTOBER TERM, 1989

SAVE OUR STREAMS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission abused its discretion when it denied petitioner's untimely motion to intervene in a proceeding concerning an exemption for a proposed hydroelectric project.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 883 F.2d 1024 (Table). The orders of the Federal Energy Regulatory Commission denying late intervention (Pet. App. 28a-33a) and denying rehearing (Pet. App. 5a-8a) are reported, respectively, at 38 F.E.R.C. ¶ 61,058 and 38 F.E.R.C. ¶ 61,313.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1989. A petition for rehearing was denied on November 1, 1989 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on January 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 15, 1984, Mega Hydro, Inc., filed an application with the Federal Energy Regulatory Commission for an exemption from licensing covering a small hydroelectric project in Madera County, California.[1] After accepting the application, the Commission established June 27, 1985, as the deadline for filing comments, competing applications, and requests for intervention in the exemption proceeding; notice of this action was published in the *Federal Register* on May 28, 1985. 50 Fed. Reg. 21,649, 21,651. The Commission also published notice in the *Madera Tribune*, the principal newspaper of general circulation in Madera County.

Almost a year after the deadline for intervention motions, on June 17, 1986, petitioner filed a motion for leave to intervene in the exemption proceeding. Petitioner maintained that "good cause" existed for late intervention under Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214(d), because notice in the *Madera Tribune* was not a method likely to advise petitioner of the application for the exemption. Pet. App. 29a.

2. On July 30, 1986, the Commission's Secretary, acting under authority delegated to him by the Commission, issued a notice finding that petitioner had failed to show "good cause" for allowing it to intervene in the administrative proceedings. The Secretary explained that *Federal Register* publication constituted adequate constructive notice of exemption applications and that publication in the county

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[1] In general, under Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(1), a license is required for hydroelectric projects that affect interstate or foreign commerce. However, the Commission is authorized by Section 405(d) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705(d), to grant exemptions from these requirements for certain small power projects of 5,000 kilowatts or less.

newspaper, while not required by statute, "served to supplement notice and inform the public affected by the proposal." Further, the Secretary observed that the record established that petitioner had actual notice of the application soon after the intervention deadline but nevertheless failed to move to intervene within a reasonable time.[2]

3. In an order issued January 28, 1987 (Pet. App. 28a-33a), the Commission affirmed the Secretary's determination that petitioner had not made a showing of "good cause" sufficient to justify late intervention under Rule 214(d). Moreover, the Commission concluded that petitioner had failed to demonstrate that its interests would not be adequately protected by other parties in the proceeding, such as the California Department of Fish and Game or the United States Fish and Wildlife Service. The Commission also found that intervention at such a late date could cause undue prejudice to Mega Hydro by disrupting the timely processing of its exemption application. Pet. App. 32a-33a.

Thereafter, the Commission denied petitioner's request for rehearing. Pet. App. 5a-8a. The Commission rejected petitioner's contention that the Commission's notice of the deadline for intervention petitions was insufficient to comply with the Commission's obligations under the National Environmental Policy Act of 1969. The Commission also found unwarranted petitioner's asserted concern that a motion for intervention filed before *Federal Register* notice of the deadline would be rejected as premature. *Ibid.*[3]

4. The court of appeals, in an unpublished memorandum order (Pet. App. 1a-2a), affirmed the Commission's

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[2] Notice Denying Late Intervention, Project No. 5756-005 (July 30, 1986). We have lodged copies of this notice with the Clerk of the Court.

[3] On March 16, 1987, the Commission issued an order granting Mega Hydro's exemption application. *Mega Hydro, Inc.*, 38 F.E.R.C. ¶ 62,275.

orders. The court noted that petitioner had conceded that it had actual notice of Mega Hydro's application shortly after the intervention deadline but had waited nearly a year before filing its motion to intervene. The court held that because petitioner had failed to show good cause for its delay, the Commission had not abused its discretion in denying the motion to intervene. *Id.* at 2a.

ARGUMENT

The Federal Power Act provides expressly that only parties to Commission proceedings may seek administrative and judicial review of the Commission's orders. Under Section 313(a), 16 U.S.C. 825*l*(a), "[a]ny person * * * aggrieved by an order issued by the Commission in a proceeding under [the Act] to which such person * * * is a party" may apply for rehearing of a Commission order. Similarly, Section 313(b), 16 U.S.C. 825*l*(b), provides that "[a]ny party to a proceeding under [the Act]" may petition for review in an appropriate court of appeals. As this Court observed in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958), these provisions "prescribe[ ] the specific, complete and exclusive mode for judicial review of the Commission's orders."

The Commission is empowered to promulgate rules and regulations specifying the procedures through which persons interested in a Commission proceeding may become parties and thereby acquire the right to seek administrative and judicial review. Section 308(a) of the Federal Power Act, 16 U.S.C. 825g(a), provides:

> In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other

person whose participation in the proceeding may be in the public interest.

Pursuant to this authority, the Commission has promulgated its Rule 214, 18 C.F.R. 385.214, specifying the procedures and standards governing intervention in Commission proceedings. Subsection (d) of that rule provides that in considering a motion for late intervention, the Commission may consider a variety of factors, including (i) whether the movant has good cause for a late filing, (ii) whether the movant's interest is adequately represented by other parties, and (iii) whether any prejudice or additional burden would be imposed upon existing parties. 18 C.F.R. 385.214(d).

Because the statute limits administrative and judicial review to parties to Commission proceedings, the only question properly presented by this case is whether the Commission abused its discretion in denying a motion for intervention filed nearly a year out of time. As the court of appeals' unpublished memorandum concluded, the Commission was within its discretion in refusing to admit petitioner as a party. That decision, which rests on the particular facts of this case, presents no question warranting further review.

It is well settled that an administrative agency possesses broad discretion with respect to procedural questions of the type presented by this case. As the Ninth Circuit observed in *Pankratz Lumber Co.* v. *FERC*, 824 F.2d 774, 777 (1987), "[b]ecause Congress has empowered FERC to promulgate regulations governing the issuance of exemptions from licensing of certain small hydroelectric power projects, courts afford it broad discretion in determining its own procedures." See also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978); *Pacific Gas & Elec. Co.* v. *FERC*, 746 F.2d

1383, 1386 (9th Cir. 1984). It is appropriate for a court to "defer to FERC's interpretation of its own regulation unless plainly erroneous." *Pankrantz Lumber Co.* v. *FERC*, 824 F.2d at 777. Further, where the Commission's rules empower it to exercise discretion, its actions should not be overturned in the absence of a showing of substantial prejudice and an abuse of that discretion. *Ibid.*

In this case, the Commission concluded that none of the factors that its rules require it to consider in connection with an untimely motion for intervention supported adding petitioner to the proceeding. As the court below noted, petitioner "concede[d] it had actual notice of the application in mid-1985, shortly after the June 27, 1985, intervention deadline, and nearly a year before it filed its motion to intervene." Pet. App. 2a.[4] Petitioner also failed to demonstrate that its interests would not be adequately represented by other parties to the proceeding, and the Commission was justified in its conclusion that allowing intervention at that late date would prejudice the applicant and disrupt the proceedings. See also *Covelo Indian Community* v. *FERC*, 895 F.2d 581, 586-587 (9th Cir. 1990) (affirming

[4] Petitioner asserts that it withheld its motion to intervene because of concern that a filing in advance of the *Federal Register* notice would be rejected as premature. Pet. 10-11. However, it cites no instance in which a motion to intervene was denied on this basis. Contrary to petitioner's suggestion (Pet. 11 n.13), *City of Gallup* v. *FERC*, 702 F.2d 1116, 1123-1124 (D.C. Cir. 1983), does not justify any such concern; that case involved petitions for *judicial* review and turned on considerations particular to that type of filing. The Commission's decision in *Halecrest Co.*, 38 F.E.R.C. ¶ 61,312 (1987), which affirmed that the Commission does accept intervention motions submitted before *Federal Register* notice, did not represent a change in the Commission's procedures in this respect.

the Commission's denial of late intervention on similar grounds).

There is no conflict between the decision in this case and *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952). Indeed, in that case, the Court refused to reverse an administrative order because a party to the proceeding had failed to present its claim by means of a timely administrative objection—even though the Court acknowledged that the order was tainted by "an irregularity which would invalidate a resulting order if the [agency] had overruled an appropriate" and timely objection. *Id.* at 38.[5] Nor can the Commission's action fairly be characterized as "an unwarranted extension[ ] of the [administrative] exhaustion rule." Pet. 18. In the Federal Power Act, Congress provided expressly that only parties to Commission proceedings would enjoy the right to seek administrative and judicial review, and it conferred authority on the Commission to prescribe procedures and standards governing intervention. The Commission's straightforward application of that authority to the particular facts of this case presents no question warranting this Court's attention.[6]

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[5] There is also no conflict between the decision in this case and *Swanson Mining Corp.* v. *FERC*, 790 F.2d 96 (D.C. Cir. 1986). See Pet. 21. In *Swanson Mining*, the applicant was a public agency with responsibility for protecting a State's wildlife and environment, and the Commission therefore found that the agency's participation in the proceeding was necessary to protect the public interest. 790 F.2d at 105.

[6] The petition also seeks review of the merits of petitioner's objection to the Mega Hydro project. Since petitioner was not a party to the administrative proceeding, however, the court of appeals had no occasion to consider that question and it is not properly before this Court. Moreover, the Commission's disposition of Mega Hydro's application for an exemption does not conflict with the Ninth Circuit's opinion in *Tulalip Tribes* v. *FERC*, 732 F.2d 1451 (1984). In that case, the Ninth Circuit held that regulations making exemptions available for projects using dams of up to ten feet in height that impounded no

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1990

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more than two acre-feet of water were inconsistent with 16 U.S.C. 2708(b); that Section allows exemptions only for projects that do not involve "any dam or impoundment." Since the decision in *Tulalip Tribes*, the Commission has considered applications for exemptions on a case-by-case basis without regard to the regulation that the Ninth Circuit disapproved. The Commission has also made clear that exemptions are not available for projects that include "(1) [r]aised diversion structures that span the entire width of the stream, and (2) diversion structures that partially cross a stream and that significantly block the natural flow." Pet. App. 52a. The history of the Commission's actions in this area is set forth in its Order No. 503, which is reproduced at Pet. App. 34a-77a. As petitioner concedes, there is no conflict among the circuits on the validity of the Commission's present approach. Accordingly, even if it were properly before the Court, that question would not call for this Court's review.

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